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No. 87-2066

IN THE

# Supreme Court of the United States

OCTOBER TERM 1989

W.S. KIRKPATRICK & CO., INC., *et al.*,
*Petitioners,*

vs.

ENVIRONMENTAL TECTONICS CORPORATION INTERNATIONAL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

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October 5, 1989

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## BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

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This *amicus curiae* brief is submitted in support of the respondent, Environmental Tectonics Corporation, International. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

## INTEREST OF *AMICUS CURIAE*

The American Bar Association (the "Association") is appearing as *amicus curiae* in view of its long-standing interest in avoiding impediments to the legal process in disputes having foreign aspects. The Association is concerned that the act of state doctrine has been unnecessarily expanded in the lower courts to deny litigants their day in court. When

applied, the act of state doctrine absolutely bars any adjudication in cases and controversies over which our courts have jurisdiction conferred by Congress or state legislatures. Because it preempts the normal legal process, the act of state doctrine should be sparingly applied and only for sound and persuasive reasons.

The Association desires to present a position that none of the parties before the Court will apparently argue. Specifically, this brief urges that in deciding this case, the Court should reconsider the rationale for the act of state doctrine and return the doctrine to its conflict of laws origins (and away from its current preoccupation with the conduct of foreign relations). Such an approach would ensure a more principled use of the doctrine in this and other cases. It would limit the situations where the doctrine could preempt the normal legal process, while enhancing the rule of law in litigation involving foreign state acts.

The Association has previously taken similar positions. Goal VIII of the Association ("to advance the rule of law in the world") has as one of its objectives "the development of the rule of law in . . . resolution of conflict between nations and between nationals of different nations." An overly broad application of the act of state doctrine, by contrast, frustrates the legal process and the rule of law in cases having foreign aspects.

More specifically, the Association has sought to reduce the number of situations in which the act of state doctrine is applied. In August 1984, the Association adopted a resolution recommending amendment of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, in accordance with eight principles. The fifth of those principles was to:

> Add a new [provision] which excludes application of the act of state doctrine by a foreign state in cases where the Act confers jurisdiction upon the federal

> courts to adjudicate claims for expropriation or breach of contract.[1]

Although the present case before the Court does not concern expropriation or breach of contract—but only whether a U.S. court may make a factual finding regarding the reasons for a foreign contract award—similar interests are at stake. This is a civil dispute between U.S. litigants under U.S. statutes, in a case where a U.S. court has undeniable jurisdiction. The claims are certainly no less susceptible to the judicial process than expropriation and breach of contract claims mentioned in the Association's above-quoted resolution. The Association's interest and goal in furthering the rule of law in disputes having foreign aspects would be impaired by expanding the act of state doctrine to cover this type of case. Indeed, such an extension of the doctrine will necessarily involve a rationale inconsistent with the Association's recommendations in this area.

## SUMMARY OF ARGUMENT

A. The Court should reevaluate the basis of, and justifications for, the act of state doctrine as a necessary part of its decision in this case. Based on this Court's reasoning in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the lower courts have viewed the act of state doctrine as requiring them to make threshold assessments of the possible foreign relations implications of their decisions. If a judge believes that inquiry into a foreign state act will have foreign relations implications, the act of state doctrine may bar any further adjudication. Invoking the doctrine preempts all further legal proceedings. Yet, judges often lack the diplomatic materials and experience with which to predict if their

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[1] The Board of Governors of the Association adopted an additional resolution in November 1987 recommending support for an international convention on foreign state of immunity. That resolution recommended that any such convention "not preclude the further development of national remedies against foreign states consistent with general principles of international law."

actions will produce some foreign relations friction—or if any possible friction will be serious enough to warrant preemption of a court's Article III responsibility to hear cases and controversies over which it has jurisdiction.

The present case involves such a proposed preemption of the judicial process. Under the reasoning of the *Sabbatino* decision, the lower courts in this case faced a Hobson's choice. They could have simply deferred to the real foreign affairs experts, the State Department, which sent a letter to the district court; but that would have surrendered judicial independence to the executive. Or, they could have followed the logical thrust of *Sabbatino* (which they did), making stabs at predicting possible foreign relations implications of their actions as a prelude to hearing the case.

The reasoning of the *Sabbatino* decision overlooked the main historical foundations of the act of state doctrine. Originally, the doctrine was a conflict of laws rule in the broad sense. It essentially said that foreign courts and authorities are the appropriate bodies to review the validity of a foreign state's acts in its own territory—and under its own laws. U.S. courts were not to conduct this kind of judicial review. The doctrine simply allocated competence between U.S. courts and a foreign state's own authorities in reviewing the validity of foreign state acts performed in the foreign state's own territory.[2]

Returning the doctrine to its conflict of laws foundations (and away from its current foreign relations focus) will produce a more predictable and defensible rule. It will spare the courts from a task for which they are ill-equipped. It will spare litigants from foreign relations predictions by judges lacking foreign relations experience.

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[2] Where a foreign state act is claimed to violate an international principle but the court concludes that the international principle has not yet become a settled rule of international law, the only body of law under which the state act may be reviewed is, once again, the foreign state's domestic laws. This is the situation that essentially was found to exist in *Sabbatino*, 376 U.S. at 428-30.

B. The Association takes no position on whether principles other than the act of state may limit inquiry into the motivations or causes of foreign government action. Similar principles exist in the domestic context. If, however, the act of state doctrine is returned to its conflict of laws foundations, the doctrine itself ought not bar judicial inquiry in this case. The district court was not asked to review the validity of a foreign state act performed in that state's own territory, by applying the foreign state's own laws. The doctrine as a conflicts rule does not prevent our courts from engaging in normal fact-finding.

## ARGUMENT

### THE ACT OF STATE DOCTRINE SHOULD BE RETURNED TO A CONFLICT OF LAWS RULE

Respondent Environmental Tectonics Corporation, International ("ETC") seeks civil damages on grounds that petitioners allegedly won a Nigerian air force contract from ETC through bribery of Nigerian government officials. Unlike a criminal prosecution under the Foreign Corrupt Practices Act, however, ETC in this civil action had to allege more than payments or offers of bribery. ETC also had to allege that it was injured by such payments of offers. To establish a causal link between the alleged bribery and ETC's claimed injury, a trier of fact must find that the alleged bribery of Nigerian officials had a causal effect on the contract award to petitioners.

Petitioners claim that such a finding—indeed, any such inquiry by a U.S. court—is barred by the act of state doctrine. We submit that invoking the doctrine as a bar to the normal judicial process of fact-finding would be an unwarranted extension of the doctrine. Indeed, it would be a derogation from the judiciary's Article III responsibilities to adjudicate cases and controversies over which they have jurisdiction. *See Sabbatino*, 376 U.S. at 450-51 (White J., dissenting). Of

more immediate concern, however, the Court should reconsider the general basis for applying the act of state doctrine as part of its decision in this case.[3]

### A. The Doctrine Should Be a Conflict of Laws Rule That Simply Precludes Judicial Review of the Validity of a Foreign State's Public Acts Under Its Own Laws

1. Traditionally, the act of state doctrine precluded U.S. courts from engaging in judicial review of (1) the validity (2) of a foreign state's public acts (3) fully performed within the foreign state's own territory. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 400 (1964). The doctrine allocated competence as between U.S. and foreign courts to pass judgment on a foreign sovereign's public acts, based on principles of territoriality:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

*Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). This principle was derived from the English common law. *See Sabbatino*, 376 U.S. at 416.

Until this Court's decision in the *Sabbatino* case, the act of state doctrine was a type of "conflict of laws" rule in the broadest sense. It allocated competence to review state acts between our judiciary and foreign judiciaries. It applied only to the review of foreign state acts performed in the foreign state's own territory—and, thus, presumptively governed by the foreign state's own laws. *Cf. American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("the character of

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[3] This Court has previously requested argument on the question, "Should this Court's holding in *Banco Nacional de Cuba v. Sabbatino*, . . . be reconsidered?" *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 422 U.S. 1005 (1975). However, this question was not reached in the eventual decision on the merits in that case. *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976).

an act as lawful or unlawful must be determined wholly by the law of the country where the act is done"). U.S. courts would not sit in judgment on the validity of such foreign acts of state, in the sense that our courts would not judicially review foreign state acts under the national laws of the foreign state. We similarly expected foreign courts not to review the validity of U.S. government acts under U.S. law.[4]

This conflicts rule did not apply to all acts of a foreign state. First, if the foreign state act was not fully consummated within the foreign state's own territory but required the assistance of U.S. courts to give effect to the act, U.S. courts would first determine whether the foreign state act was consistent with U.S. public policy. For example, if a foreign state attempted to expropriate property situated within the United States, U.S. courts would determine whether the expropriation was consistent with U.S. public policy regarding takings. If not, a U.S. court would not recognize the foreign state act as valid. *See Moscow Fire Ins. Co. v. Bank of New York*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd sub. nom. United States v. Moscow Fire Ins. Co.*, 309 U.S. 624 (1940); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).[5]

Second, U.S. courts would not give effect to a foreign state act if doing so would amount to an enforcement of the foreign state's penal or revenue laws. *See Huntington v. Attrill*, 146 U.S. 657, 669 (1892); *Moore v. Mitchell*, 30 F. 2d 600 (2d Cir. 1929), *aff'd on other grounds*, 281 U.S. 18 (1930); *Sabbatino*, 376 U.S. at 413-14; *id.* at 447-50 (White, J., dissenting).

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[4] This conflicts rule was at one time based on considerations of comity and respect for other sovereigns. *See Sabbatino*, 376 U.S. at 458 (White, J., dissenting); Brief of the Republic of China as *Amicus Curiae*, at 8-12.

[5] Conversely, when it applies, the act of state doctrine overrides the normal conflict of laws rule that courts will not give effect to foreign laws repugnant to the public policy of the forum. The foreign state act is recognized even if contrary to public policy of the forum. *Sabbatino*, 376 U.S. at 446 (White, J., dissenting).

Third, even if a foreign state act had been fully consummated within its own territory, the earliest U.S. decisions did not recognize the act as valid if the act violated a settled principle of international law or the law of nations. In *Rose v. Himely*, 8 U.S. (4 Cranch.) 241 (1808), Chief Justice John Marshall reviewed the validity of a French court's condemnation of a ship within French territory, drawing a distinction between a review under the foreign country's own laws and a review under the law of nations:

> Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations . . . .

*Id.* at 276-77. *Cf. Hudson v. Guestier*, 8 U.S. (4 Cranch.) 293, 294 (1808) (U.S. courts may not review a foreign court judgment "unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice").

Early this century, however, this Court said that the doctrine applied even where a foreign state act was claimed to violate international law. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918).[6] The ruling was not necessary to the decision, as the Court later recognized. *Sabbatino*, 376 U.S.

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[6] *Cf. Shapleigh v. Meir*, 299 U.S. 468, 471 (1937).

at 417. Nor did the ruling address the contrary reasoning in *Rose v. Himely* or in earlier British decisions.[7]

Notwithstanding the unsettled "international law" corollary to the doctrine, courts continued to apply the act of state doctrine as a conflict of laws principle—at least until *Sabbatino* was decided. As the Second Circuit stated when asked to review the validity of an act of the government of Spain:

> We agree, however, with the contentions of the defendants that the question of the *validity under Spanish law* of the secret decree, or of any other step in the purported acquisition of title to the silver by the Spanish government, is not open to examination by us. If these acts took place, they took place within Spain. It has been squarely held that the courts of this country will not examine the acts of a foreign sovereign within its own borders, *in order to determine whether or not those acts were legal under the municipal law of the foreign state.*

*Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438, 443 (2d Cir. 1940) (emphasis added). *See also Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947) ( a court "will not undertake to pass upon the validity under the municipal law of another state" of acts of that foreign state's officials); *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 F. 126, 129 (S.D.N.Y. 1918), *aff'd sub nom. The Claveresk*, 264 F. 276 (2d Cir. 1920).

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[7] *See Wolff v. Oxholm*, [1817] 6 M. & S. 92, 106, 105 Eng. Rep. 1177, 1182 (holding that a court was not bound to respect a foreign state ordinance "not conformable to the usage of nations"); *Republic of Peru v. Dreyfus Bros. & Co.*, [1888] 38 Ch. D. 348 (where an English court chose to disregard a Peruvian statute found to be contrary to international law, even though it purported to annul a contract executed and performed within Peru); *In re Fried Krupp Actien-Gesellschaft*, [1917] 2 Ch. D. 188, 193-94.

Some members of the Court have similarly acknowledged the conflict of laws roots of the doctrine. In cases involving expropriation of property in a foreign state's own territory, the doctrine has been described as related to "the conflict of laws rule, adopted in virtually all nations, that the lex loci is the law governing title to property." *Sabbatino*, 376 U.S. at 445 (White, J., dissenting).[8] More broadly, Justice White stated:

> We are not dealing here with those cases where a court refuses to measure a foreign statute against . . . the fundamental law of the foreign state itself. In those cases the judicially created act of state doctrine is an aspect of the conflict of laws rules of the forum and renders the foreign law controlling.

*Id.* at 470-71. Similarly, in an opinion joined by Justices Brennan and Blackmun, Justice Marshall noted that

> the act of state doctrine merely tells a court what law to apply to a case; it "concerns the limits for determining the validity of an otherwise applicable rule of law."

*Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682, 726 (Marshall, J., dissenting), quoting *Sabbatino*, 376 U.S. at 438.

2. This Court's 1964 decision in the *Sabbatino* case has been extended far beyond its actual holding. *Sabbatino* involved a dispute over who was entitled to the proceeds from a sale of sugar that had been expropriated in Cuba by

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[8] In an opinion joined by then Judge Scalia, it was noted that such acts of state may be "grounded in the 'primeval interest' of a sovereign state to 'resolv[e] all disputes over use or right to use of real property within its domain.' " *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1569 (D.C. Cir. 1984) (Judge Starr, dissenting), *vacated*, 471 U.S. 1113 (1988), *quoting Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984).

the Cuban government. The former owners claimed the proceeds (which had been attached in New York) on grounds that the expropriation violated customary international law. This Court held only that rules of customary international law concerning "takings" were not sufficiently settled to permit U.S. courts to review the validity of the Cuban government's action under international law, and, thus, the act of state doctrine barred review by a U.S. court of the validity of the taking:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle. . . . Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

*Sabbatino*, 376 U.S. at 428.[9]

This holding, however, was interwoven with an entire reformulation of the act of state doctrine and its basis. The Court announced that act of state was now a separation of powers doctrine whose "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs." *Id.* The Court continued:

> It is also evident that some aspects of international law touch more sharply on national nerves than do others;

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[9] Congress has attempted to overturn this particular holding in 22 U.S.C. § 2370(e)(2).

> the less important *the implications of an issue are for our foreign relations*, the weaker the justification for exclusivity in the political branches.

*Id.* (emphasis added).[10]

Thus, the Court appeared to announce a new rationale for the doctrine, at least in those cases where it was claimed that a foreign state act contravened international law. The Court appeared to transform the doctrine from a conflict of laws rule into a balancing test based on foreign relations considerations. The Court seemed to invite lower courts to assess how important "the implications of an issue are for our foreign relations" when deciding whether to invoke the doctrine.

The lower courts have seized the invitation. They have ruled that the "act of state doctrine calls upon the courts to make a preliminary assessment . . . of 'the likely impact on international relations that would result from judicial consideration of the sovereign's act.' " *O.N.E. Shipping v. Flota Mercante Grancolombiana*, 830 F.2d 449, 452 (2d Cir. 1987), quoting *Allied Bank Int'l v. Banco Credito*, 757 F.2d 516, 520-21 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). They have held, without any expert guidance, that "any analysis by this court would have an adverse effect on the relations between this country and Mexico." *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 326 (5th Cir. 1982). They have similarly found it to be "clear" that any judicial scrutiny of foreign government decisions involving petroleum "would embarrass the political branches of our government in the conduct of foreign policy." *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983); *see International Association of Machinists v. OPEC*, 649 F.2d 1354, 1359-61 (9th Cir. 1981), *cert denied* 454 U.S. 1163 (1982).

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[10] The majority in *Sabbatino* appeared concerned that if a proposed rule of international law was not settled and that if, instead, a U.S. court was asked to engage in "the sensitive task of *establishing* a principle," foreign relations implications could ensue. *Id.* at 428 (emphasis added).

Even when the doctrine has not been applied to bar an adjudication, the lower courts have undertaken to decide if lawsuits over which they have jurisidiction would have "the potential for interference with our foreign relations," *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976); or if an adjudication "might possibly present problems of international relations." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979).

Casting judges as assayers of foreign policy implications has also led, in some of our courts of appeal, to the expansion of the act of state doctrine at issue in this case. In *Clayco, supra*, the issue was whether allegedly unlawful payments to foreign officials caused (or motivated) the award of an oil concession. As here, the existence of the payments (and their receipt by foreign officials) was not the reason to invoke the act of state doctrine. Nor, as here, was the Court asked to review the validity of any state act. Rather, the court of appeals said that *any* judicial inquiry into whether those payments had a causal effect on the concession award would have foreign policy implications and "thus embarrassment would result from adjudication." *Clayco*, 712 F.2d at 407. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (holding that any judicial inquiry into the motivation of a state act would result in "hindering and embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine").

Even the court of appeals in the present case felt it had to venture into the arena of making foreign policy evaluations. It gave great "respect" to a letter the district court had received from the State Department suggesting no foreign policy embarrassment would result from an adjudication in this case. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3841 (1989). But the State Department views could not be "controlling." *Id.* at 1057 n.6 and 1062, citing this

Court's split decision in *First National Bank v Banco Nacional de Cuba*, 406 U.S. 759 (1972). Hence, the court of appeals felt it had to make its own assessment of the foreign relations implications of continuing with this case—which proved to be different from the district court's assessment.

The current split in the circuits on the issue now before the Court can be directly attributed to differing assessments of foreign relations implications. Compare *Environmental Tectonics* and *Industrial Investment Development Corp. v. Mitsui*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980) (finding no preclusive foreign policy implications where motivation—but not validity of a state act—was at issue), with *Clayco*, 712 F.2d at 407, and *Hunt*, 550 F.2d at 77. Simply put, the separation of powers rationale of *Sabbatino* asks judges to engage in foreign relations evaluations for which they generally lack the necessary diplomatic background and foreign policy experience. Conflicting evaluations are the inevitable result. Some litigants are able to have their claims heard; others are not.

3. The Court in *Sabbatino* apparently felt compelled to reevaluate the act of state doctrine, since it had not had occasion to consider the doctrine in the aftermath of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See Sabbatino*, 376 U.S. at 425. The Court concluded that the act of state doctrine, though a rule fashioned by the courts, "must be determined according to federal law." *Id.* at 427. It found ample constitutional and statutory support reflecting a need for national uniformity and "indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Id.* at 427 n.25. This part of the analysis was fundamentally sound and sufficient to support a federal rule.

Nevertheless, the Court apparently felt it could not base a federal rule on earlier rationales for the doctrine. It characterized these earlier rationales as based simply on "historic notions of sovereignty." *Id.* at 421. It then found that the doctrine was neither derived from international law nor required by the Constitution. *Id.* at 421-23. So it attempted

to build on statements in earlier decisions suggesting that if U.S. courts reviewed sovereign acts performed in the sovereign's own territory, international friction might arise. Thus, the Court announced that separation of powers considerations—as "constitutional underpinnings"—would henceforth be the basis for this federal, court-fashioned doctrine (at least where a state act was said to violate international law). *Id.* at 423.

For whatever reason, the majority in *Sabbatino* did not address directly the conflict of laws foundations of the doctrine, which are more than mere "notions of sovereign authority." Broadly speaking, conflict of laws is a set of rules "which determines what effect is given to the fact that [a] case may have a significant relationship to more than one state." *Restatement (Second) of Conflict Of Laws § 2 (1971).* As discussed above, the doctrine, until *Sabbatino,* allocated competence between our judiciary and foreign courts. A U.S. court is hardly the competent or appropriate body to declare a foreign state act invalid under "the fundamental law of the foreign state." *Sabbatino,* 376 U.S. at 470-71 (White, J., dissenting). Similarly, if a foreign state act performed in the foreign state's territory is claimed to violate an international principle which has not become a settled rule of international law (as found in *Sabbatino*), the only "law" by which the state act can be reviewed is, again, the foreign state's domestic law. Once again, U.S. courts are not the appropriate bodies to engage in such judicial review.

Recasting the act of state doctrine as a federal conflict of laws rule is supported by the same constitutional and statutory authorities relied on in *Sabbatino* for a separation of powers rule. *Sabbatino,* 376 U.S. at 427 n.25. The need is unquestioned for the nation to speak with one voice in defining the outer limits of our judicial power to review foreign

state acts. A federal rule is no less supportable when based on conflict of laws considerations than when dressed up in "separation of powers" garb.[11]

Compelling reasons exist for the Court, in deciding this case, to return the act of state doctrine to its traditional foundation as a conflict of laws rule of federal dimension. First, in deciding this and other act-of-state cases, a conflicts rule provides a readily ascertainable standard that the lower courts and state courts can consistently apply. A court need only determine if the case before it requires review of the validity of a foreign state act fully performed in the foreign state's own territory and governed by the foreign state's own laws. If such review of validity is required, the doctrine bars adjudication of that issue (and of the remaining parts of the case if they cannot be segregated); otherwise, the case proceeds in the normal fashion. As it did in *Sabbatino*, the Court can leave to a future case the question of whether validity may be reviewed under a settled rule of international law or under a treaty provision.[12]

Second, so long as "foreign policy implications" remain the touchstone of the act of state doctrine, the lower courts (and litigants) will face an untenable situation. On the one hand, they cannot simply let the State Department dictate

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[11] *See* Leigh & Sandler, *Dunhill: Toward A Reconsideration of Sabbatino*, 16 Va. J. Int'l L. 685, 709-16 (1976); *cf. Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2513-16 (1988). *See also* Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 Am. J. Int'l L. 68, 90-91 (1985).

[12] Since *Sabbatino* was decided, at least one court of appeals has held that a foreign state's expropriatory acts performed within a foreign state's own territory can be reviewed under an international rule contained in a treaty or international agreement. *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984). Compare *American International Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981), with *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1118 (5th Cir. 1985).

when a case will be adjudicated, or barred, by abject deference to the agency that has the actual foreign policy expertise. Such a course would strip the judiciary of its independence. *See Dunhill*, 425 U.S. at 725-26 (Marshall, J., dissenting). On the other hand, allowing the current situation to be perpetuated requires judges to make inexpert pronouncements (or guesses) about the foreign relations consequences of a case, as a prelude to exercising customary judicial functions. Judges are presumptive experts in applying a conflict of laws rule, but presumptive laymen in trying to predict foreign relations implications of their acts.

Third, no overriding reason exists for the courts to make foreign relations assessments a part of an act of state doctrine. No such endeavor has been found necessary for other judicial actions that have the potential for foreign relations implications. As noted above, U.S. courts will not honor a foreign state's expropriation of property situated in the United States if the taking is not consistent with U.S. public policy. Neither will U.S. courts give effect to a foreign state's penal or revenue laws, irrespective of the foreign relations impact. *See Sabbatino*, 376 U.S. at 413-14. U.S. courts routinely decide (without regard to foreign affairs concerns) whether persons wanted by a foreign state will be extradited, even though there may be foreign relations implications to the extradition proceedings. In contested criminal prosecutions under the Foreign Corrupt Practices Act, U.S. courts and juries may be called on to make detailed inquiries concerning the taking of bribes by foreign government officials. Even a plea agreement may involve offers of proof implicating foreign officials. *See Environmental Tectonics*, 847 F.2d at 1056. Courts regularly interpret treaties, without first determining the impact of the potential interpretation on relations with any foreign state. *See Kolovrat v. Oregon*, 366 U.S. 187, 194-96 (1961); *cf. Zschernig v. Miller*, 389 U.S. 429, 432 (1968). In none of these situations has the need arisen to ask the lower courts to make assessments of foreign relations implications before deciding whether to hear the case.

There may be a future case when the actual foreign policy experts, the executive branch, may believe that an adjudication relating to a foreign state act may have an impact on the immediate conduct of foreign relations. There has been *no* such case to date—not even on remand in *Sabbatino*—where the executive has felt compelled to ask a court to apply the act of state doctrine.[13] More to the point, there are other legal tools to deal with such a situation. As in the Iranian hostage crisis, the executive branch may seek to stay litigation for an extended period, pending resolution of a crisis. *E.g., Chas. T. Main Int'l v. Khuzestan Water*, 651 F.2d 800, 804 n.4 (1st Cir. 1981); *see Sabbatino*, 376 U.S. at 471 (White, J., dissenting) ("The proper disposition is to stay the proceedings until circumstances permit an adjudication . . . "). Or, if a U.S. citizen's claim is against a foreign government or its agencies, the U.S. government may "espouse" the claim and settle it in certain circumstances. *See Dames & Moore v. Regan*, 453 U.S. 654, 679-88 (1981); *United States v. Pink*, 315 U.S. 203, 229-30 (1942); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (1984) (per Judge Scalia). If foreign policy interests require a protective order or other special procedures, the government may file a suggestion of interest with any court under 28 U.S.C. § 517. It may also advise any court of foreign policy determinations affecting factual issues in a case. *See, e.g., Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231, 232 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). Under other conflict of laws and comity principles, U.S. courts have self-imposed limits on compelling discovery of foreign documents and information. *See Societe Internationale v. Rogers*, 357 U.S. 197 (1958). Foreign government

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[13] *See* letter of the Department of State's Legal Adviser to the Solicitor General, appended to the opinion of the Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976); and the letter of the State Department's Legal Adviser to the district court appended to the opinion of the court of appeals below, *Environmental Tectonics*, 847 F.2d at 1067-69. Similarly, the executive branch has never used its post-*Sabbatino* statutory authority to invoke the act of state doctrine in expropriation cases when required "by the foreign policy interests of the United States." 22 U.S.C. § 2370(e)(2).

claims of executive privilege have been recognized in U.S. courts. *See Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984); *cf. Ghana Supply Commission v. New England Power Co.*, 83 F.R.D. 586 (D. Mass. 1979). U.S. courts may decline to exercise jurisdiction under the doctrine of *forum non conveniens*. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). Of course, some issues bearing on foreign relations may not be susceptible to resolution under ascertainable legal standards and, thus, nonjusticiable under the "political question" doctrine. *See Goldwater v. Carter*, 444 U.S. 996 (1979).

The act of state doctrine, even if properly founded as a conflict of laws rule, will have ancillary benefits in the area of foreign relations. But no logical or empirical reason exists why foreign relations implications must be the central touchstone of this court-made rule. A "conflict rule would have been enough in itself to have controlled the outcome of most of the act of state cases decided by this Court." *Sabbatino*, 376 U.S. at 445 (White, J., dissenting).

For the reasons stated, the doctrine need not put judges in the position of making foreign relations determinations, or put litigants at the mercy of those determinations. Before deciding if the doctrine applies in the case now before the Court, we urge the Court to reconsider the doctrine's proper basis and to return the doctrine to its conflict of laws foundations.[14]

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[14] *Stare decisis* does not preclude reconsideration. The holding in *Sabbatino* is not at issue here, but only a portion of its reasoning that appears unworkable. *See Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) ("Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of stare decisis once it is proved to be unworkable in practice"). Of course, "adherence to precedent is not rigidly required in constitutional cases . . . ." *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984). The act of state doctrine, moreover, involves neither a statutory nor a constitutional standard, but simply a Court-made rule of federal common law that is intended to survive *Erie v. Tompkins*. As demonstrated, the

*(footnote continues)*

**B. A Factual Inquiry Into The Causes Of A Foreign State Act Is Not Barred By The Act Of State Doctrine Itself.**

1. The Association takes no position on the ultimate merits of this case. The logic of the position expressed in part A above, however, indicates that the act of state doctrine should not be applied in this case.

As a conflict of laws rule, the act of state doctrine addresses the competence to review the validity of foreign state acts. It is not a bar to judicial fact-finding. The district court below was not asked to declare the contract award invalid under Nigerian domestic law. Nor was the district court asked to review the Nigerian contract award under international principles which are not sufficiently settled to be treated as rules of international law (thus leaving Nigerian law as the only system of applicable legal rules). Indeed, the contract award may be entirely lawful under Nigerian law; that issue is not before the Court. Since neither the validity nor the legal effect of the contract award itself is at issue, the act of state doctrine should not be applied.

2. The Court might consider other principles, *not* part of the act of state doctrine, that would limit the ability of U.S. courts to review the motivations or causes of foreign government actions. In a domestic context, the Court has placed limitations on reviewing the motivations underlying the actions of cabinet officials and Congress. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In this area, a distinction is sometimes drawn between subjective influences on government action and the avowed purposes and causes of

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*(footnote continued)*

rationale for this rule as announced in *Sabbatino* involved a departure from earlier jurisprudence supporting the doctrine. The Court subsequently appeared to question this rationale when, in the *Dunhill* case, it asked for reargument on whether the *Sabbatino* holding should be reconsidered. *Dunhill*, 422 U.S. 1005.

an act as stated in official pronouncements such as a legislative history. *See Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting). Policy reasons, however, may exist in special cases for examining subjective influences on a government decision—such as where the decisionmaker has been bribed. *Cf. California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965).

The germs of such an approach in the foreign context appear in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Although sometimes characterized as an "act of state" case, *American Banana* itself did not purport to apply the act of state doctrine. The Court simply held that the antitrust laws did not extend to acts committed in a foreign country—incuding efforts to persuade a foreign state to act against a competitor. The Court also declared that "persuading a foreign power to do this or that cannot be a tort," at least not under the law of the foreign power. *Id.* at 358.

Any rule limiting inquiry into the reasons or motivations for a foreign state act would involve different considerations than a rule completely barring judicial review of a foreign state act's validity. For example, policy reasons often exist for not probing the mental processes of government officials. *See United States v. Morgan*, 313 U.S. at 422. Certain types of influences on government conduct (foreign or domestic) may not be susceptible to judicial measurement. *See United States v. O'Brien*, 391 U.S. at 383-84. In some cases, however, policy reasons might support inquiry into the decision process, or Congress may have authorized such an inquiry by the courts.

No record has been made in this case against which such principles might be developed or applied. Because the act of doctrine was invoked before any discovery or evidentiary proceedings occurred in this case, ETC has not yet had an opportunity to present or obtain its proof regarding the reasons for the contract award. It is possible that ETC or the

petitioners may have access to documents stating or indicating the reasons for the award. Or perhaps payments to officials are not prohibited in Nigeria and, for this or other reasons, Nigerian officials or others may be willing to furnish proof of the reasons.

Conversely, ETC may face obstacles in meeting its burden of proof on the issue of causation. It may be faced with claims of government privilege. Nigeria may refuse to honor letters rogatory. Objective evidence of the reasons for the award may not exist. These possibilities, however, are not presently before the Court. The Association takes no position on these latter issues.

## CONCLUSION

For the reasons and on grounds set forth above, the act of state doctrine should be returned to a conflict of laws rule.

Respectfully submitted

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